IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S139237

THE CITY OF STOCKTON, a California municipality,
THE REDEVELOPMENT AGENCY OF THE CITY OF STOCKTON, a California municipal redevelopment agency,

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SACRAMENTO,

Respondent,

CIVIC PARTNERS STOCKTON, LLC,

Real Party in Interest.

The Court of Appeal of the State of California, Third Appellate District, No. C048162
Superior Court of the State of California, Sacramento County, No. 03AS00193

ANSWER OF PETITIONERS THE CITY OF STOCKTON AND THE REDEVELOPMENT AGENCY OF THE CITY OF STOCKTON TO FALLBROOK PUBLIC UTILITY DISTRICT'S *AMICUS CURIAE* BRIEF

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I. INTRODUCTION

Fallbrook Public Utility District ("Fallbrook") has filed an *amicus* brief offering a construction of the scope of the Government Code claims presentation rules at issue that is highly at odds with existing precedent and well-established canons of statutory construction. Fallbrook's brief:

- Employs a "results-driven" approach to statutory construction that almost entirely ignores the plain language, legislative history, and case law construing the Government Code sections at issue, in wrongly concluding that contract claims are not within those claims subject to the claims presentation statutes;
- Argues, without any real basis, that this Court should overrule the holding of *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455, which requires that "claims statutes must be satisfied even in face of the public entity's actual knowledge of the circumstances surrounding the claim."
- Discusses only superficially two cases exhaustively discussed in previously filed briefing, *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113 and *Holt v. Kelly* (1978) 20 Cal.3d 560, in a way that does not come to grips with how to apply the principles of those decisions to cases like the case currently before the Court.

In sum, Fallbrook's brief argues positions that either must be rejected as contrary to well-established law, or that do not contribute substantively to the issues this Court is addressing in this case.

II. FALLBROOK HAS NO "UNIQUE" PERSPECTIVE ON THE CASE

Fallbrook argues that as a public entity making a claim against another public entity, it has a "unique perspective" from which to argue that contract claims should not fall within those claims for "money or damages" (Govt. C., § 905) that are subject to the claims presentation rules. To the contrary. Its interest is in fact the same interest as any claimant who faces the claims bar of Government Code section 945.4 because of its noncompliance with the mandatory claims presentation rules.

Fallbrook finds itself in the unusual position of a public entity that had to comply with a public entity claims statute, but did not do so. As a general rule, public entities making claims against other public entities are exempted from complying with the claims presentation rules (Govt. Code, § 905(i)), although Government Code section 935 authorizes local public entities receiving claims from other local public entities to enact pre-suit claims processes applicable to such claims. Apparently, Fallbrook failed to comply with such an enactment in the case of *United States of America and Fallbrook Public Utility District v. Eastern Municipal Water District, et al.,* Case No. 04-8182 (C.D. Cal.).

A theme of Fallbrook's brief is that the claims presentation rules create a "trap for the unwary." Fallbrook's position, however, seems to be disingenuous and "reverse engineered" to fit its current predicament. Fallbrook either neglected to discover that Eastern Municipal Water District had adopted a claims process under Section 935, or failed to do the basic legal research that would have informed any competently represented party that contract claims were among the claims for money or damages on

which a pre-suit claim had to be made. Either way, there is really no excuse for a party in Fallbrook's position to have failed to realize that pre-suit claims presentation requirements at least *probably* applied to its claim, and to investigate the matter further.

One way that Fallbrook does have a "unique perspective" is that—alone among California public entities—it has chosen to file an amicus brief arguing positions that, if adopted, would exclude contract claims from the pre-suit claims process and multiply controversies over whether claimants had complied with the claims process. As shown by the support for Stockton's position through the *amicus* briefs filed by the League of California Cities, the California State Association of Counties, and the Los Angeles Unified School District, there are no "two camps" within the public entity community about how this case should be decided. Virtually all public entities interpret the claims presentation rules as Stockton does.

III. FALLBROOK'S INTERPRETATION OF GOVERNMENT CODE SECTION 905 MUST BE REJECTED, BECAUSE ITS INTERPRETATION RESTS ON IGNORING WELL ESTABLISHED CANONS OF STATUTORY CONSTRUCTION

A. Section 905 Is Not Ambiguous or "Confusing"

There is no disagreement among the Courts of Appeal in recent cases about whether contract claims are within the claims presentation requirements of Section 905. All such cases decided after 1985 uniformly hold that they are.[1] Thus, whether contract claims must be submitted in the claims presentation process has not been a "trap for the

[1] These cases are compiled in Stockton's Answer Brief on the Merits at p. 14, fn. 5. It appears that the most recent case holding the opposite is *Harris v. State Personnel Board* (1985) 190 Cal.App.3d 639, 643.

unwary" for many years now.[2] There is no ambiguity or "confusion" about this requirement. Although the practice of referring to the claims presentation rules as being part of the "California *Tort* Claims Act" (a term that nowhere appears in the statute) may have caused confusion in the past about whether contract claims were also subject to claims presentation requirements, that problem, to the extent that it still exists at all, will be resolved through the Court's decision in this case that such claims *are* within the statute.

B. Contrary to What Fallbrook Contends, Section 905 Makes No Distinction Between "Legal" and "Equitable" Claims

Section 905's reference to "money or damages" makes no distinction between claims based on legal and equitable theories. If the suit seeks "money", then it is within the statute, unless specifically excluded. Indeed, the fact that the statutory wording is "*money or* damages" supports the interpretation that the scope of the statute goes beyond "damages" recoverable under "legal" claims such as breach of contract. Some equitable remedies – as most relevant here, unjust enrichment – involve the payment of money, even though such a payment is not "damages" but rather restitution from a person who has been unjustly enriched at the expense of another. 1 Witkin, *Summary of California Law*, (10th Ed) (2005) Contracts §1016. Section 905's use of the phrase "money or

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[2] In addition to the cases holding that contract claims are subject to the claims presentation requirement, standard treatises inform even the marginally diligent practitioner of the requirement. 35A, *Cal.Jur.3d*, Government Tort Liability, §4, p. 16 ("The legislature never intended the statute to exempt contract actions from the claims provisions of the Act....The purposes served by the Act clearly apply whether an underlying action sounds in tort or contract."); 3 Witkin, *California Procedure* (4th Ed.), Actions, 2006 Supplement, p.67.

damages", far from creating confusion, clarifies that equitable claims involving the payment of money fall within the scope of claims governed by the statute. A contrary interpretation of the statute would render the inclusion of the word "money" in Section 905 meaningless. *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 ("A construction making some words surplusage is to be avoided").

C. Fallbrook's Comparison of Government Code Sections 905 and 905.2 Does Not Support The Conclusion That Contract Claims Fall Outside The Claims Presentation Requirements Applicable to Public Entities

Section 905 defines when pre-suit claims must be presented to *local public entities* as a prerequisite to filing suit. Section 905.2 defines when pre-suit claims must be presented to the *State*. Despite their similar purpose, the two sections are structurally different. Section 905 expressly applies to "all claims for money or damages *except*" specifically enumerated claims. Section 905.2, by contrast, takes the approach of expressly listing which claims for money or damages *are* subject to pre-suit claims requirements, with all others being outside the claims presentation requirement.

Both contract claims and injury claims are specifically listed in Section 905.2(b)(3) as claims for which a pre-suit claim is required against the State. Neither contract claims nor injury claims are specifically included within any list of claims "for money or damages" for which a pre-suit claim is required against local public entities under Section 905. No such list exists—or is needed—because "all claims for money or damages *except*" specifically exempted claims fall within the claims subject to pre-suit filing requirements under Section 905.

Fallbrook nonetheless argues that if the Legislature intended Section 905 to apply to contract claims, it would have expressly listed such claims in Section 905 as claims to which that section applies. [Fallbrook brief, pp 7-9.] But if the Legislature's intent had to be expressed in that manner and no other, by that same logic, injury claims would also fall outside the scope of Section 905, because the Legislature did not expressly mention them either as being within the scope of that section.

No one denies that injury claims are within the scope of claims that must be presented to local public entities under Section 905, even though they are not on some list of expressly included claims. The same is true of contract claims. Fallbrook's position thus contains a fatal inconsistency that cannot be explained.

D. Fallbrook's Reliance On Out-Of-State Authority Is Misplaced

Fallbrook argues that "other states and jurisdictions with Claims Acts generally do not require that an injured party present a breach of contract claim to a government agency." Whether or not this is true – and Fallbrook's own brief concedes that some states do make contract claims subject to claims presentation requirements – this observation does not aid the Court in its task of interpreting whether contract claims are claims for "money or damages" within the meaning of Section 905. Of the claims statutes discussed in Fallbrook's brief, not one of them interprets that specific phrase.

Smith v. Superior Court (2006) 39 Cal.4th 77, 90-91 discusses the very limited role that reference to the wording of other states' purportedly analogous statutes normally plays in interpreting the wording of California statutes. In *Smith,* a key issue was how to interpret the term "discharge", as used in Labor Code section 201 to describe the

termination of employment. The court relied upon the plain language of the statute, the overall statutory scheme and the legislative history of the statute, in construing the meaning of the term "discharge" – and criticized the Court of Appeal for improperly relying on inconsistent case law from Arkansas and Louisiana which interpreted the word "discharge" more narrowly. *Id.*, at 91.[3]

The Court should adopt the same approach here. Fallbrook notes, in support of a policy argument that contract claims should be excluded from the scope of California's claims presentation requirements, that the Federal Tort Claims Act (28 U.S.C. §2401 *et seq.*) and the claims statutes of Oregon and Washington expressly limit the claim presentation requirement to tort claims, and that in other jurisdictions (Alaska, Wyoming and Guam) contract claims are expressly stated to be within those jurisdictions' claims acts. But California's Government Code section 905 takes a different approach. Section 905 generally includes all claims from money or damages within the claims presentation requirement, with enumerated exceptions. The policy choices that Congress and other jurisdictions made, expressed through language dissimilar to that found in section 905, are thus of *no relevance* to interpreting what the California Legislature intended through use of the phrase "money or damages".[4]

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[3] Obviously, the situation would be different if the statute in question were part of a uniform code, such as the Uniform Commercial Code, where the wording of statutes is identical across state lines and there is a policy interest in a uniform nationwide application of statutory terms. That is not the situation here, however.

[4] Indeed, the Federal Tort Claims Act provisions are expressly limited to tort actions because an entirely separate statutory scheme controls claims against the United States based upon contract. (See Contract Disputes Act of 1978, 41 U.S.C. §601 *et seq.*)

E. The Court Should Reject Fallbrook's Policy Arguments For Excluding Contract Claims From Those Governed By Section 905

1. The Government Code Claims Presentation Rules Have the Intended Effect of Shortening Statutes of Limitations, Which Should Not be Disturbed

The statute of limitations for breach of written contract is four years. (Code Civ. Proc., § 337.) Fallbrook contends that because it is (purportedly) often difficult to determine when a cause of action for breach of contract has accrued, public policy favors not applying the relatively short one year deadline for filing a claim found in Government Code section 911.2 to contract claims. Whatever the merits of this position, the Legislature clearly rejected it through enacting the clear language of Government Code sections 905 and 911.2. Those sections require the filing of pre-suit contract claims within one year of the accrual of the claim.

Noteworthy is that the period for filing a contract claim against a public entity is often not as short as Fallbrook suggests. The period of limitation for filing claims against a local public entity begins to run from the date that the cause of action accrues under the statute of limitation that would apply if there were no claim presentation requirement. (Govt. Code, §§ 901 and 911.2.) A cause of action for breach of contract accrues—at the plaintiff's election—upon either (1) anticipatory breach or repudiation or (2) upon the later termination of the contract. *Romano v. Rockwell International, Inc.* (1996) 14

Cal.4th 479, 489-490. Thus, in circumstances similar to those alleged in this case, a plaintiff may elect to defer presenting a claim until contract termination.[5]

Fallbrook offers no facts supporting its theory that requiring claims in contract actions to be presented promptly under the claims presentation rules will impair local public entities' ability to secure contracts. Government contracts often impose numerous additional terms required by law, not found in private contracts, relating to resolution of contract disputes (*see e.g.*, Public Contract Code §§20104 and 20104.2.) Even assuming for the sake of argument that these provisions deter some otherwise willing businesses from doing business with local public entities, the weighing of the benefits and costs of requiring such provisions be made a part of public contracts is a Legislature function.

2. It is Unnecessary to Exclude Contract Claims From the Claims Presentation Requirements to Prevent Unfair Results in Public Entity Contract Litigation

Fallbrook argues that construing the claims statute to require a pre-suit claim on contract disputes creates a "Hobson's choice" (or more accurately stated, a dilemma) for a party contracting with a local public entity, in situations where the contracting party must choose either to file a claim or forego it in the hopes of preserving a valuable relationship with the local public entity. But such a dilemma is nothing more than the same one all parties face all the time in deciding whether to sue on a contract between

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[5] In *Romano*—and as Civic alleges here—the contract was repudiated but the plaintiff continued to rely upon it in the hope that the defendant would rescind its repudiation. The court held that the plaintiff may elect to wait until the contract is actually terminated rather than being forced to file an action at a time when the defendant's performance is not yet due, and/or when the plaintiff is still receiving benefits of the contract. *Id.* Thus, in such circumstances the plaintiff has time to attempt to resolve a claim before it must face any adverse consequences of filing a claim.

private parties. Litigation can be destructive of relationships, to be sure, but there are ways of avoiding litigation while parties attempt to resolve their disputes – such as tolling agreements, alternative dispute resolution processes and the like – that can address the problem without subverting Legislative intent.[6]

IV. GOVERNMENT CODE SECTION 905 DOES NOT VIOLATE CLAIMANTS' DUE PROCESS RIGHTS AND IS NOT UNCONSTITUTIONALLY VAGUE IN ITS APPLICATION TO CONTRACT ACTIONS

Constitutional challenges to the Government Claims Act are nothing new. They uniformly have been rejected. As this Court recently noted in *Bodde:*

> ". . . requiring plaintiffs to allege facts sufficient to demonstrate or excuse compliance does not deprive them of their due process rights or unfairly bar just claims." *State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1245.

Previous decisions have also rejected Fallbrook's argument that the claims statutes impair vested property rights. Any claim against California public entities exists only by virtue of the state's consent to be sued and it therefore does not exist independent of the statutes at issue:

> "Moreover, the constitutional authority empowering the Legislature to control the manner in which the government is sued (Cal. Const., art. III, § 5, *supra*,), has been construed as a consent to be sued, not an independent basis upon which to hold the government liable (*Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 220 [11 Cal.Rptr. 89,

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[6] Furthermore, a local public entity which misleads a potential claimant into not timely filing a claim may be estopped to rely on the claims presentation rules as a bar to a later breach of contract claim. *See, e.g., State v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1245 (case remanded to the appellate court with directions to consider whether the "plaintiff had, in fact, alleged facts sufficient to excuse compliance on the ground of estoppel"). Moreover, unlike private parties, public entities generally must contract with the lowest responsible bidder, regardless of whether there have been prior claims or litigation between the parties on other contracts.

> 359 P.2d 457]). In short, since a governmental entity in California may be sued only by virtue of consent, the vested right analysis applied in *Grubaugh* is manifestly inappropriate (Citation)."

Stanley v. City and County of San Francisco, (1975) 48 Cal.App.3d 575, 578-581. *See also Dias v. Eden Township Hospital Dist.* (1962) 57 Cal.2d 502, 504 (statutory claim requirement does not constitute arbitrary and unreasonable discrimination); *Tammen v. County of San Diego* (1967) 66 Cal.2d 468, 481(statutory claims requirements do not violate the constitutional guarantees of due process and equal protection); *Lewis v. City and County of San Francisco* (1971) 21 Cal.App.3d 339, 340-341 (claims statute does not unconstitutionally deny equal protection of the law).

The claims presentation statutes are, at a minimum, not so vague as to support a due process challenge on the ground of vagueness:

> The foregoing statutory provisions which define with precision and clarity the respective rights and duties of both the individual claimants and the public entities cannot be said to be unreasonable, arbitrary or vague and thus subject to constitutional attack on due process grounds.

Stanley v. City and County of San Francisco, supra, 48 Cal.App.3d, at 578-581. (Emphasis added.)

V. THE COURT SHOULD REJECT THE PROPOSITION, VIRTUALLY UNSUPPORTED BY ANY AUTHORITY, THAT PRESENTING A CLAIM IS NOT REQUIRED WHERE AN AGENCY HAD SUFFICIENT INFORMATION, EVEN IN THE ABSENCE OF A CLAIM, TO INVESTIGATE THE CLAIM.

Relying primarily on *Stockett v. Assn. of California Water Agencies Joint Powers Insurance Authority* (2004) 34 Cal.4th 441, Fallbrook argues that this Court should enact through judicial fiat a sweeping exception to the claims presentation rules, that would allow a claimant to file a complaint without first complying with the claims presentation

rules, wherever the claimant could prove that the public entity "had actual knowledge of, or should reasonably have been aware of, the claim at issue." Fallbrook's argument is contrary to well-established precedent, including this Court's holding that "claims statutes must be satisfied even in face of the public entity's actual knowledge of the circumstances surrounding the claim." *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455.

Stockett did not overrule *City of San Jose,* and is not authority for the change in the law that Fallbrook proposes. It holds only that an otherwise properly submitted Government Code claim need not contain the detail and specificity required of a pleading so long as it fairly describes what the entity is alleged to have done. That is a far cry from what Fallbrook now proposes. To adopt the rule that Fallbrook proposes here would be to overrule the Legislature's choice that if a pre-suit claim has not been timely filed, it must be barred.

VI. THE CLAIMS REQUIREMENTS APPLY TO CIVIC'S EQUITABLE CLAIMS

Fallbrook's discussion of this point adds little to previous briefing on this matter, and misstates the cases discussed. For example, Fallbrook describes the holding of *Minsky v. City of Los Angeles* (1974) 11 Cal.3d 113 as a recognition that "a plaintiff could demand that the government return money the plaintiff had paid when the government refused to perform its end of the bargain." [Fallbrook brief, p. 18.] In fact, *Minsky* arose out of a seizure of money by the Los Angeles Police Department from an arrestee, which the LAPD then held as evidence, but did not return upon disposition of

the ensuing criminal case. *Minsky* had nothing to do with the LAPD "not performing its end of the bargain"—there being no bargain for it to perform—only a ministerial duty to return the seized funds that the LAPD had held as a bailee.

Fallbrook's analysis of *Holt v. Kelly* (1978) 20 Cal.3d 560 is also flawed. Again, the case arose out of a seizure of property from an arrestee by law enforcement officials, in that case the Trinity County Sheriff's Department. In *Holt,* some of the seized property – plaintiff's carpentry work tools, among other items – had been "misplaced." The Court held that the plaintiff could recover money in lieu of the seized items misplaced, without first filing a claim under the Government Code. The rationale was that the recovery of money was "merely ancillary" to an underlying proceeding seeking performance of a ministerial duty (i.e., the return of the seized goods) enforceable by writ of mandate—which is not a claim for "money or damages" within Section 905. *Id.* at p. 565, fn.5.

Examining the contours of when a monetary recovery is "merely ancillary" to action seeking the performance of a ministerial duty is left unaddressed in Fallbrook's brief. As Stockton has discussed at length in its Answer Brief on the Merits [pp. 27-34], *Holt* must be limited to the bailee context, because to do otherwise would allow claimants who had not presented a claim an "escape hatch" around the claim presentation requirement. *See Trafficschoolonline, Inc. v. Clarke* (2000) 112 Cal.App.4th 736, 742. Just as in *Trafficschoolonline,* this case is one in which the payment of money is not "merely ancillary" to any other relief—instead, money is almost the whole relief being sought by Civic.

Indeed, Civic's Second Amended Complaint clearly alleges breach of contract claims that seek damages [Stockton, Ex. 1, pp. 0018-0023.] that would afford an adequate legal remedy if those claims were not time-barred under Government Code sections 911.2 and 945.4. Civic does not allege that it has no adequate remedy at law. [Stockton, Ex. 1.] Nor, if Civic's contract claims are barred by sections 911.2 and 945.4, can that fact itself create the absence of an adequate remedy of law. *Wilkison v. Wiederkehr* (2002) 101 Cal.App.4th, 822, 835; *Morrison v. Land* (1915) 169 Cal. 580, 584-585. Accordingly, Civic's purported equity-based claims for restitution, unjust enrichment or constructive trust are barred. *Morrison v. Land*, supra, 169 Cal. 580, 586; *see* 5 Witkin, *California Procedure* (4th Ed.) (1997) Pleading §759.[7]

Fallbrook claims that the logic supporting characterizing equitable claims for restitution as claims for "money or damages" also would support characterizing claims for injunctive relief as claims for "money or damages," where granting the requested relief would require the expenditure of funds by the public entity. That kind of *reductio ad absurdum* argument is easily put aside; injunctions are <u>not</u> claims for money or damages; they are orders to take action or to refrain from taking action.

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[7] This issue frequently arises from a breach of an agreement to make specific bequest in a will. *See e.g., Morrison v. Land, supra*, 169 Cal. 580; *Wilkison v. Wiederkehr, supra*, 101 Cal.App.4th at 830. However, the holding in *Morrison* is not limited to those facts. *See e.g. Thayer Plymouth Center v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300, 306 (Specific performance of automobile dealership contract denied where plaintiff also alleged breach of contract and had an adequate remedy at law.); *Pacific Decision Sciences Corporation v. Superior Court (Orange County)* 121 Cal.App.4th 1100, 1110 (Preliminary injunction may not issue to enforce a contract to pay money where plaintiff has not alleged the defendant cannot pay a judgment for damages.).

VII. CONCLUSION

To adopt the positions Fallbrook advances in its *amicus curiae* brief would require this Court to ignore the plain language, legislative history, and all the recent cases interpreting the scope of Section 905's "money or damages" language as encompassing breach of contract claims, and go in a completely opposite direction based on alleged policy considerations that the Legislature considered and rejected. Section 905 plainly applies to contract claims, and this Court should so hold.

Nor should this Court create an exception-swallowing-the-rule escape hatch from claims presentation compliance by overruling the *City of San Jose* case, or by allowing plaintiffs to recast contract claims as "equitable" claims that are purportedly exempt from the claims presentation rules. To do so would greatly reduce the utility of the claims presentation rules to local public entities, in contravention of Legislative intent. For all these reasons, and for the reasons stated in Stockton's Answer Brief on the Merits, Stockton urges this Court to reject Fallbrook's unsupported contentions, and to affirm the Court of Appeal's decision below.

DATED: February 21, 2007

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By _____
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Certification under California Rule of Court Rule 8.520(c)

The undersigned counsel for petitioners The City of Stockton and The Redevelopment Agency of The City of Stockton certifies that this brief is produced in 13 point font, and that, according to the word count of the computer program used to prepare the document, this brief, including footnotes, contains 3,989 words.

DATED: February 21, 2007

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PROOF OF SERVICE

I, Hazel Ebalo-Gillespie, certify and declare that I am over the age of 18, and not a party to this action. My business address is Wulfsberg Reese Colvig & Firstman Professional Corporation, 300 Lakeside Drive, 24th Floor, Oakland, California 94612, located in Alameda County, which is the County where the below-described mailing took place. I am readily familiar with the business practice at my place of business for collection and processing of correspondence and other documents. Correspondence and documents so collected and processed are deposited with the United States Postal Service or other delivery service that same day in the ordinary course of business.

On February 21, 2007, at my place of business, I served the enclosed document(s) entitled:

ANSWER OF PETITIONERS THE CITY OF STOCKTON AND THE REDEVELOPMENT AGENCY OF THE CITY OF STOCKTON TO FALLBROOK PUBLIC UTILITY DISTRICT'S *AMICUS CURIAE* BRIEF

on all party(s) listed in the attached mailing list in this action, by providing a true copy of each said document(s) to the following person(s) in the following manner:

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

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I declare under penalty of perjury under the laws of the State of California, that the foregoing is true. Executed at Oakland, California, on February 21, 2007.

Hazel Ebalo-Gillespie